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In the
SUPREME COURT OF THE UNITED STATES

ABIGAIL NOEL FISHER,
Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICI CURIAE* OF 53 CURRENT MEMBERS OF THE TEXAS STATE SENATE AND HOUSE OF REPRESENTATIVES IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici[1] are current members of the Legislature of the State of Texas, members of the State Senate and House of Representatives who together reflect Texas's broad diversity, including its geographic and growing racial and ethnic diversity. They submit this brief in support of respondent, the University of Texas – our State's flagship institution of higher education and the alma mater of many of the State's most important leaders, including many members of the legislature – in furtherance of their responsibility to ensure that the citizens of Texas have equal access to higher education and unfettered pathways to leadership and opportunity in the State. They also do so in recognition of their sworn obligation to advance the interests of all the people of Texas and to adopt bold solutions to the problems that affect their lives. *Amici* wholly endorse the holistic, individualized admissions system at issue in this appeal. They maintain that it – together with the Top Ten Percent Law (House Bill 588) enacted by the legislature in 1997 that accounts for the vast majority of student admissions under the University's blended program – represents a proper and constitutional response to the changing

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *Amici Curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than *Amici Curiae* or their counsel made a monetary contribution intended to fund the brief's preparation or submission. Letters from the parties consenting to the filing of this brief have been filed with the Clerk.

demographics of our State and the challenges facing higher education in the 21st Century. The university admissions process that these strategies comprise -- which the Legislature has formally endorsed -- reflect the state of Texas's ongoing democratic conversations about the realities of race within its jurisdiction and considered judgment about the specific solutions necessary to advance its educational objectives amidst such challenges.

Senator Rodney Ellis (D-Houston, District 13) has served as a member of the Texas Senate since 1990.

Representative Hubert Vo (D-Houston, District 149) has served as a member of the Texas House of Representatives since 2005.

Representative Sylvester Turner (D-Houston, District 139) has served as a member of the Texas House of Representatives since 1989.

Representative Rafael Anchia (D-Dallas, District 103) has served as a member of the Texas House of Representatives since 2005.

Representative Ron Reynolds (D-Missouri City, District 27) has served as a member of the Texas House of Representatives since 2011.

Representative Donna Howard (D-Austin, District 48) has served as a member of the Texas House of Representatives since 2006.

Senator Judith Zaffirini (D-Laredo, District 21) has served as a member of the Texas Senate since 1987

Representative Ramon Romero, Jr. (D-Fort Worth, District 90) has served as a member of the Texas House of Representatives since 2015.

Senator Royce West (D-Dallas, District 23) has served as a member of the Texas Senate since 1993.

Senator Carlos Uresti (D-San Antonio, District 19) served as a member of the Texas House of Representatives from 1997 to 2006 and has served as a member of the Texas Senate since 2006.

Representative Ana Hernandez (D-Houston, District 143) has served as a member of the Texas House of Representatives since 2005.

Senator Sylvia Garcia (D-Houston, District 6) has served as a member of the Texas Senate since 2013.

Representative Armando Walle (D-Houston, District 140) has served as a member of the Texas House of Representatives since 2009.

Representative Ruth Jones McClendon (D-San Antonio, District 120) has served as a member of the Texas House of Representatives since 1996.

Representative Armando Martinez (D-Weslaco, District 39) has served as a member of the Texas House of Representatives since 2005.

Representative Terry Canales (D-Edinburg, District 40) has served as a member of the Texas House of Representatives since 2013.

Senator Juan Hinojosa (D-McAllen, District 20) served as a member of the Texas House of Representatives from 1981 to 1991 and 1997 to 2003 and has served as a member of the Texas Senate since 2003.

Representative Justin Rodriguez (D-San Antonio, District 125) has served as a member of the Texas House of Representatives since 2013.

Senator José Rodríguez (D-El Paso, District 29) has served as a member of the Texas Senate since 2011.

Representative Mary González (D-Clint, District 75) has served as a member of the Texas House of Representatives since 2013.

Representative Chris Turner (D-Grand Prairie, District 101) served as a member of the Texas House of Representatives from 2009 to 2011 and again since 2013.

Representative Elliott Naishtat (D-Austin, District 49) has served as a member of the Texas House of Representatives since 1991.

Senator John Whitmire (D-Houston, District 15) served as a member of the Texas House of Representatives from 1973 to 1983 and has been a member of the Texas Senate since 1983.

Representative Jessica Farrar (D-Houston, District 148) has served as a member of the Texas House of Representatives since 1995.

Representative Celia Israel (D-Austin, District 50) has served as a member of the Texas House of Representatives since 2014.

Representative Helen Giddings (D-Dallas, District 109) has served as a member of the Texas House of Representatives since 1993.

Representative Poncho Nevárez (D-Eagle Pass, District 74) has served as a member of the Texas House of Representatives since 2013.

Senator Eddie Lucio, Jr. (D-Brownsville, District 27) served as a member of the Texas House of Representatives from 1987 to 1991 and has been a member of the Texas Senate since 1991.

Senator José Menéndez (D-San Antonio, District 26) served as a member of the Texas House of Representatives from 2001 to 2015 and has been a member of the Texas Senate since 2015.

Senator Kirk Watson (D-Austin, District 14) has served as a member of the Texas Senate since 2007.

Representative Alma Allen (D-Houston, District 131) has served as a member of the Texas House of Representatives since 2005.

Representative Carol Alvarado (D-Houston, District 145) has served as a member of the Texas House of Representatives since 2009.

Representative Yvonne Davis (D-Dallas, District 111) has served as a member of the Texas House of Representatives since 1993.

Representative Joe Deshotel (D-Beaumont, District 22) has served as a member of the Texas House of Representatives since 1999.

Representative Garnet Coleman (D-Houston, District 147) has served as a member of the Texas House of Representatives since 1991.

Representative Harold Dutton, Jr. (D-Houston, District 142) has served as a member of the Texas House of Representatives since 1985.

Representative Eric Johnson (D-Dallas, District 100) has served as a member of the Texas House of Representatives since 2010.

Representative René Oliveira (D-Brownsville, District 37) served as a member of the Texas House of Representatives from 1981 to 1987 and again since 1991.

Representative Senfronia Thompson (D-Houston, District 141) has served as a member of the Texas House of Representatives since 1973.

Representative Trey Martinez Fischer (D-San Antonio, District 116) has served as a member of the Texas House of Representatives since 2001.

Representative Abel Herrero (D-Robstown, District 34) served as a member of the Texas House of Representatives from 2005 to 2011 and again since 2013.

Representative Eddie Rodriguez (D-Austin, District 51) has served as a member of the Texas House of Representatives since 2003.

Representative Gene Wu (D-Houston, District 137) has served as a member of the Texas House of Representatives since 2013.

Representative Nicole Collier (D-Dallas, District 95) has served as a member of the Texas House of Representatives since 2013.

Representative Borris Miles (D-Houston, District 146) served as a member of the Texas House of Representatives from 2007 to 2009 and again since 2011.

Representative Roberto Alonzo (D-Dallas, District 104) served as a member of the Texas House of Representatives from 1993 to 1997 and again since 2003.

Representative Diego Bernal (D-San Antonio, District 123) has served as a member of the Texas House of Representatives since 2015.

Representative Joe Moody (D-El Paso, District 75) has served as a member of the Texas House of Representatives since 2009.

Representative R.D. "Bobby" Guerra (D-Mission, District 41) has served as a member of the Texas House of Representatives since 2012.

Representative Toni Rose (D-Dallas, District 110) has served as a member of the Texas House of Representatives since 2013.

Representative Roland Gutierrez (D-San Antonio, District 119) has served as a member of the Texas House of Representatives since 2008.

Representative Dawnna Dukes (D-Austin, District 46) has served as a member of the Texas House of Representatives since 1995.

Representative César Blanco (D-El Paso, District 76) has served as a member of the Texas House of Representatives since 2015.

SUMMARY OF ARGUMENT

Our country is in the midst of an ongoing "national dialogue" regarding higher education, diversity, and the best ways to ensure educational access and opportunity. *Schuette v. Coalition to Defend Affirmative Action, et al.*, 134 S.Ct. 1623, 1631 (2014). This Court has recently not only affirmed the principle that "our federal structure 'permits [State] innovation and experimentation'" in addressing the nation's most pressing problems, *id.* at 1630 (quoting *Bond v. United States*, 131 S.Ct. 2355, 2364 (2011), but has also underscored the "significance" of such experimentation in the public educational context, *id.*, an area of critical importance. *See Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (underscoring "the overriding importance of preparing students for work and citizenship"). It has also acknowledged that states, within constitutional limits, may reasonably reach different conclusions about how best to respond to educational conditions and dynamics within their jurisdictions. *See Schuette*, 134 S.Ct. at 1630-31. Indeed, our federal system contemplates and even encourages such diversity in state decision making. *Younger v. Harris*, 401 U.S. 37, 44 (1971).

In respect of its higher education admissions, Texas -- one of the "active lab[s] of experimentation embraced by the Court in *Schuette v. BAMN*," *Fisher*, Petitioner's Appendix at 33a-34a (Pet. App.) -- has taken thoughtful and considered steps to address the realities of race and 21st Century higher education, in a state that is rapidly growing and increasingly diverse. These are formidable

challenges acknowledged by this Court in its multiple decisions affirming that "diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities." *Grutter v. Bollinger*, 539 U.S. at 322, 325; *see also*, Pet. App. at 104a-08a; *Grutter*, *supra*; *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307-09 (1978). The University of Texas ("UT") – our state's flagship university – has, since 2004, utilized a hybrid admissions system designed to ensure that all students enrolled there received the benefits of a diverse education. That admissions system – adopted after years of experimentation, collaboration, and study on the part of the State Legislature and educators – consists of two parts that work in concert with one another.

The first component of UT's admissions system, the Top Ten Percent Law – which was enacted 15 years ago in the wake of the U.S. Court of Appeals for the Fifth Circuit's decision in *Hopwood v. Texas*, 78 F.3d 932, 957 (5th Cir. 1996) – mandates that "Texas high school seniors in the top ten percent of their class be automatically admitted to any Texas state university [including the University of Texas]." Pet. App. 165a (citing Tex. Educ. Code § 51.803 (1997)). The vast majority of the entering class is admitted under the Top Ten Percent Law. For example, in 2008, when petitioner applied to the University, 81 percent of the entering class gained admission under this provision. *Id.* at 172a.

The second component of UT's admissions program affects applicants who, like petitioner, are not admitted through the operation of the Top Ten

Percent Law. Since *Hopwood*, these students' applications have been reviewed through a holistic, individualized process that permits educators to consider both an Academic Index ("AI") composed of grades and test scores and a Personal Achievement Index ("PAI") that evaluates leadership, student honors, prior work history, community involvement and extracurricular activities, socioeconomic status and other unique factors and accomplishments. Beginning with the admissions cycle for the 2005 freshman class, educators are permitted to consider race as one of many factors under the holistic, individualized review process that comprises part of the University of Texas's overall admissions system. The holistic program adopted by UT fully complies with the requirements of strict scrutiny. *Id.* at 104a-08a. It is functionally identical to the plan approved by this Court in *Grutter*, as the Court of Appeals previously noted. *Id.* at 217a.

In reasserting and even expanding her challenge to the constitutionality of UT's admissions program, petitioner proceeds as if the law has somehow changed since *Grutter* was decided. But this Court's 2013 decision in *Fisher* did not alter or "retreat" from prior precedent. *Id.* at 16a. It merely affirmed its earlier holding in *Grutter*. *See id.* at 104a-08a; *see also id.* at 14a-18a. Petitioner, at bottom, objects to race playing *any* role at all in the holistic, individualized and comprehensive process of applicant review utilized by admissions officials. She asks this Court either to ignore the settled law of *Grutter* and now *Fisher* to find that the Top Ten Percent Law precludes supplementation by a *Grutter* type process or, in the alternative, to overrule its earlier decisions so that UT's program can be struck

down. *Amici* respectfully submit that this Court should decline this invitation. Texas and its educational institutions have engaged in years of good-faith experimentation with a race-neutral system that has proven inadequate to achieve the compelling interests in diversity sought to be attained. Given this, Texas' use of a multi-variable process which includes consideration of race and ethnicity among a range of other factors is both constitutional and fully consistent with this Court's precedents. Accepting petitioner's argument would run the risk of preventing Texas and other states "from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise." *United States v. Lopez*, 514 U.S. 549, 583 (Kennedy, J., concurring).

This Court's precedents require state institutions of higher education to investigate "workable race-neutral alternatives that will achieve the diversity the university seeks" before resorting to any program that relies upon race. *Grutter*, 539 U.S. at 339. This fact is fully acknowledged by UT and its leaders, all dedicated public servants who work closely with *amici* and other State Legislators. Texas and UT officials spent seven years experimenting with the race-neutral Top Ten Percent Law before the judgment to reconsider the use of race as one factor in admissions was ever made. But UT rightfully resists petitioner's ill-conceived argument that use of a race-neutral strategy that achieves some moderate results necessarily precludes the subsequent consideration of race and ethnicity in higher education permitted by *Grutter*. In this case, government officials have made an evidence-based determination that the

compelling educational benefits offered by a broadly diverse student body have not been achieved using the Top Ten Percent Law exclusively. Petitioner's argument to preclude them from applying additional criteria to bridge this gap not only has no foundation in this Court's precedents, but is expressly contrary to them.

Petitioner asks this Court to force states into a permanent choice between the two tracks – one race-neutral, the other race-conscious. In the real world, states and their leaders, including *amici* and other Texas Legislators, do not have the luxury of putting their higher education systems on autopilot, blind to demographic changes and pressures that exist and affect education on the ground. Charged with educating students who will go on to be future Presidents, military leaders, or business giants, *Sweatt v. Painter*, 339 U.S. 629, 634 (1950), states—and especially their flagship public universities—have the obligation to address such pressures and to develop solutions that respond to circumstances in real time as they develop, "where the best solution is [often] far from clear." *Grutter*, 539 U.S. at 342 (quoting *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring)). UT did that in this case – no more and no less. It altered its admissions program only after nearly a year of study and seven years of experience with race-neutral alternatives showed that UT students were not receiving the full benefits of educational diversity. By retaining its primary reliance on the Top Ten Percent Law, UT has implemented an admissions program that deploys race in the most "modest" way. *Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting). That officials have taken note of the demographic changes affecting

institutions of higher education in Texas does not change this basic fact. *Amici* are justifiably proud of the University's status as one of the premier educational institutions in the nation and, indeed, the world. But the University is equally important because of the role it plays in the State as an engine of educational opportunity. Thus, the University's officials – as well as *amici* and other State Legislators – have an obligation to be aware of demographics so that we can ensure, as we must, that visibly open pathways to leadership and opportunity exist for all Texas citizens. *See Grutter*, 539 U.S. at 332. Indeed, the very future of our State and our Nation "depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples." *Id.* at 324 (internal citations omitted). This Court's precedents rightfully express deep skepticism of government decision making based solely on race. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 230 (1995). We cannot and should not return to the days when African Americans like Heman Sweatt were excluded from the University of Texas and other institutions of higher education merely because of their race. *Sweatt*, 339 U.S. at 631. That shameful legacy of exclusion is a necessary backdrop to UT's active efforts to achieve the educational benefits of diversity. States and localities are not obligated to ignore the current situation or to settle for an educational program that lacks the diversity necessary for students to maximize their potential inside and outside of the university. Pet. App. 109a; *Grutter*, 539 U.S. at 328-30. In our federal system, states are still invested with primary responsibility

for judgments pertaining to the education and training that our future leaders receive. *Id.* at 325.

The longstanding principles of strict scrutiny, which this Court reaffirmed and clarified in its earlier decision in this case, Pet. App. 109a-12a, not the scheme petitioner proposes, provide appropriate direction on how to tread the fine line that the Constitution maps out in the area of race. As the Court of Appeals held on remand, after careful adherence to the guidance *Fisher* provides, the admissions program employed by UT fully comports with those requirements, *id.* at 3a, 52a-54a, which impose meaningful and constitutionally required constraints on government uses of race and ethnicity as admission criteria, *id.* at 16a-19a. The UT admissions standards are not a process that has been unilaterally imposed by a university administrator but rather they reflect a unique, bi-partisan, multi-racial process in which legislators, the Board of Regents, and educators worked together to advance important State educational priorities. That is the essence of federalism and of participatory democracy. This Court should thus affirm the lower court decision and uphold as constitutional UT's admissions policy – over which Texas legislators exercise continuing oversight – to ensure that UT continues to expand opportunities for students of all races, and to promote inclusion and access more generally.

ARGUMENT

I. THIS COURT'S PRECEDENTS ENCOURAGE THE CREATIVE SOLUTIONS AND STATE EXPERIMENTATION REFLECTED IN THE CHALLENGED UNIVERSITY OF TEXAS ADMISSIONS PROGRAM.

The principle that "states [have] the final decision on the bulk of day-to-day matters," Henry J. Friendly, *Federalism: A Foreword*, 86 YALE L.J. 1019, 1034 (1977), is fundamental to our federal system. This Court has long affirmed and celebrated the role of states as "laboratories of experimentation" in our federal system and their capacity to generate solutions for the nation's most pressing problems. *Lopez*, 514 U.S. at 581-82 (Kennedy, J., concurring); *see also Grutter*, 539 U.S. at 342; *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973). The states' ability to craft the kind of innovative solutions previously acknowledged by this Court, *see, e.g., Schuette*, 134 S.Ct. 1632, is most pronounced in areas where states carry out traditional functions critical to our democracy and national priorities. Education stands as one of the areas in which states and localities have been understood to possess special competencies. *See Brown v. Board of Ed. of Topeka*, 347 U.S. 483, 493 (1954) ("education is perhaps the most important function of state and local governments."); *Grutter*, 539 U.S. at 331 ("We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship."); *Plyler v. Doe*, 457 U.S. 202, 221 (1982)

(emphasizing "the importance of education in maintaining our basic institutions"); *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools."); *San Antonio Indep. Sch. Dist.*, 411 U.S. at 50 ("No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education."); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("By and large, public education in our Nation is committed to the control of state and local authorities."). The need for state and local officials to address matters of race and inequality in carrying out their obligations in this context has increasingly become apparent. *See, e.g., Parents Involved in Comm. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (emphasizing innovative strategies that government might deploy to bring "together students of diverse backgrounds and races").

The admissions program challenged in this case underscores Justice Brandeis's important observation that it "is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 386-87 (1932) (Brandeis, J., dissenting). It represents the State of Texas's effort to develop creative and innovative solutions to address the complex educational and demographic realities of 21st Century higher education as they present themselves within our jurisdiction. *Amici*, many of whom voted for the Top Ten Percent Law,

are proud of that statute and the broad diversity – including geographic diversity – that it has helped to promote in Texas institutions of higher education. They recognize, however, that the changing demographics of Texas are such that the Top Ten Percent Law cannot accomplish all that is needed to ensure that UT students, who will graduate and possibly one day become state legislators themselves, receive the full benefits of a broadly diverse educational program and environment.

The challenged individualized review process has its roots in what, since 1997, has been an ongoing, iterative, and very particular series of initiatives designed to address enrollment at the University of Texas – the State's flagship institution and the proving ground for its future public and private sector leaders. The relevant starting point for this case is the United States Court of Appeals for the Fifth Circuit's 1996 decision in *Hopwood*, 78 F.3d 932. Following *Hopwood*, UT was required to abandon race-conscious admissions. *Id.* at 957.

In anticipation of a dramatic change in the profile of UT applicants, officials at that institution adopted various race-neutral strategies which they hoped would maintain diversity among UT's student body. In particular, UT determined to pair its Academic Index (AI) – a still utilized element of the admissions process that reflects a computation based on an applicant's high school grade point, rank, and standardized test scores – with an individualized, "holistic review" that sought "to identify and reward students whose merit as applicants was not adequately reflected by their class rank and test scores." Pet. App. 163-64a. Neither this change, nor

several other race-neutral initiatives adopted by UT to boost minority enrollment – including targeted recruitment and outreach and scholarship programs – forestalled the adverse changes feared. *Id.* at 25a-29a. The number of African American and Latino students who matriculated as UT freshman still dropped precipitously.

Later in 1997, the Texas State Legislature responded to *Hopwood* and the changes in the student body at UT with the Top Ten Percent Law, House Bill 588, codified as Tex. Educ. Code § 51.803 (1997). Enacted by a bipartisan, multi-racial, and geographically diverse majority of the Legislature, including many of the *amici*, that statute effectively sets initial admissions standards at UT and other institutions by mandating "that Texas high school seniors in the top ten percent of their class be automatically admitted to any Texas state university [including UT]," Pet. App. 165a (citing Tex. Educ. Code § 51.803 (1997); *see also Statewide Higher Educational Admissions Policy*, HB588, House Research Organization Bill Analysis (April 15, 1997)[2] at 1. The purpose of this racially-neutral plan was two-fold: to ensure meaningful diversity at institutions such as UT and to "ensure a highly qualified pool of students," Pet. App. 269a (citation omitted), while expanding the range of high schools sending students to UT, *id.* at 310a. Ultimately, the Top Ten Percent Law had some success in diversifying the class racially and substantial success in diversifying it geographically, *id.* at 203a,

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[2] Available at http://www.hro.house.state.tx.us/pdf/ba75r/hb0588.pdf#navpanes=0 (last visited Oct. 30, 2015).

but, in the judgment of multiple stakeholders in Texas, it failed fully to address the lack of broad diversity in the UT learning environment, *id.* at 42a, 167a-70a, 202a-03a.

Petitioner casts the individualized and holistic admissions process – in which race was one of many factors considered in reviewing applicants like her who did not rank in the top ten percent of their high school class – as the ill-conceived brain child of a lone group of administrators acting without factual support. Pet. Br. 7-8, 27-28. But she misunderstands the place of the holistic review system in UT's admissions process. Since 2004, UT has included race and ethnicity, along with a range of other factors – including "demonstrated leadership qualities, awards and honors, work experience and involvement in extracurricular activities and community service[s]," as well as "special circumstances" such as "the socioeconomic status of the applicant and his or her high school, the applicant's family status and family responsibilities, the applicant's standardized test score compared to the average of her high school" – in an applicant's PAI, which, in turn, is considered along with grades, test scores and essays in reviewing applicants who are not admitted through the Top Ten Percent Law. Pet. App. 174a. The overall admissions system, including the individualized program of review that considers race and ethnicity as one of many factors, is properly understood as the result of a collaborative, multi-pronged effort on the part of state legislative and educational officials, building upon the Top Ten Percent Law, to ensure open access and equity in one of the largest institutions of higher education in the country.

In June 2003, this Court changed controlling constitutional law with its decision in *Grutter*, 539 U.S. 306, which overruled *Hopwood* and held that a compelling governmental interest exists for considering race as one of many factors in a system of holistic review to achieve the educational benefits of diversity. In contending that UT "leapt at the opportunity to reintroduce racial preferences" in *Grutter*'s wake, Pet. Br. 2, petitioner badly mischaracterizes the careful, deliberate process by which UT "reintroduce[d] race into its admissions" process. *Id.* at 7. The Legislature, significantly, did not act to repeal the Top Ten Percent Law. In August of 2003, the Board of Regents – which exercises the delegated authority to make educational decisions for the University of Texas[3] – did, however, authorize the University of Texas to examine "whether to consider an applicant's race and ethnicity in admissions in accordance with the standards enunciated in *Grutter*." Pet. App. 167a (internal citations omitted). Pursuant to this authorization, the University of Texas undertook a nearly year-long, deliberative review of its admissions process to determine whether race and ethnicity should be integrated into the admission process, *id.* at 169a, designed to determine whether the "University was enrolling a critical mass of underrepresented minorities," *id.* at 167a. Those studies found that "UT had not yet achieved the critical mass of underrepresented minority students

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[3] Tex. Educ. Code § 65.11 (West 2011) (vesting the governance of the University of Texas system "in a board of nine regents appointed by the governor with the advice and consent of the Senate.").

needed to obtain the full educational benefits of diversity," *id.* at 169a, and also concluded minority students felt isolated and that a majority of students 'felt there was insufficient minority representation in classrooms for the full benefits of diversity to occur," *id.* at 168a (internal citations omitted). In June 2004, after nearly a year of study and nearly seven years of experience with race-neutral admissions policies, UT officials approved a revised policy that would, consistent with *Grutter*, permit the consideration of race and ethnicity as one of many factors in a holistic system of review designed to supplement the Top Ten Percent Law and more fully secure the educational benefits of diversity found lacking in the two commissioned studies. Importantly, UT's post-*Grutter* holistic review program is widely thought to have increased the overall percentage of highly qualified underrepresented minority students. *Id.* at 170.

The Texas Legislature, which has historically been appropriately deferential to the Board of Regents to which it has delegated authority in higher education matters, had no occasion formally to ratify the hybrid admissions policy that resulted from UT's decision to consider race and ethnicity as factors under its holistic review process. The Legislature has, however, affirmed that judgment by not taking legislative action against it in 2004 and by enacting legislation that directly relies upon the operation of the holistic, individualized review process. In 2009, the Texas State Legislature amended the Top Ten Percent Law by capping the number of students who could be admitted to the University of Texas at Austin under that program at 75% of the entering freshman class, effective Fall

2011. *Id.* at 42-43. This amendment is hereinafter referred to as the "Cap Statute." The Cap Statute, which responds to University of Texas officials' concerns that they lacked admissions flexibility in an era of demographic growth, contains provisions indicating that if the use of race in the individualized review process for students not admitted through the Top Ten Percent Law is subsequently invalidated, the 75% cap would be lifted and students would be admitted to the University of Texas at Austin almost entirely under the Top Ten Percent Law.[4] In effect, the Cap Statute recognized and ratified *ex post* the admissions framework established by the adoption of UT's post-*Grutter* race-conscious holistic review. *See Limit on Top Ten Percent Automatic Admissions Policy*, SB 175, House Research Organization Bill Analysis (May 20, 2009)[5] at 6. Indeed, section 7 of the Cap Statute makes it plain that the legislature intended to "continue and facilitate progress in general academic teaching institutions in this state with regard to the racial, ethnic, demographic, geographic, and rural/urban diversity of the student bodies of those institutions in undergraduate, graduate, and professional education" and expressly did not want to "preven[t] a[ny] general academic teaching institution in this state from engaging in appropriate individualized holistic review, consistent

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[4] Tex. Educ. Code § 51.803(k) (West 2011).

[5] Available at http://www.hro.house.state.tx.us/pdf/ba81r/sb0175.pdf#navpanes=0 (last visited Oct. 29, 2015).

with that purpose, for the admission of students who are not entitled to automatic admission . . . ."[6]

In sum, *amici* respectfully submit that petitioner's efforts to discredit the processes surrounding the adoption and operation of UT's individualized, holistic admissions program should be rejected. The collaborative legislative and educational efforts reflected in UT's current admissions scheme evince the kind of careful consideration and experimentation by states that is encouraged by this Court's precedents. *See Lopez*, 514 U.S. at 582 (recognizing states and localities as important "laboratories of experimentation"). There is no reason to reconsider the "proper respect for state functions" typically accorded jurisdictions like Texas in our federal system, where it is understood that "the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways," *Younger*, 401 U.S. at 44. UT's admissions policy offers an innovative model for addressing the practical challenges of building a diverse learning environment at institutions of higher education in the 21st Century and, as discussed below, fully comports with the *Grutter* precedent to which its adoption responded.

II. EXPERIMENTATION WITH RACE-NEUTRAL ALTERNATIVES DOES NOT PRECLUDE A STATE FROM ALSO ADOPTING RACE-CONSCIOUS

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[6] 2009 Tex. Sess. Law Serv., 19 (West).

STRATEGIES THAT SATISFY STRICT SCRUTINY.

Petitioner does not challenge the Top Ten Percent Law, which results in the bulk of UT admissions. *See* Pet. App. 22a. Indeed, she essentially concedes the constitutionality of the Ten Percent Law that has informed admissions to Texas universities since 1997. Petitioner objects only to the additional admissions overlay established by the post-*Grutter* holistic program that applies to applicants not qualifying for admission under the Top Ten Percent Law. Pet. Br. 8-11. Petitioner attacks the Court of Appeals's faithful application of the strict scrutiny standards elucidated in this Court's *Fisher* decision. Pet. Br. 24. At bottom, however, her position is not that Texas's carefully constructed admissions process falls short of the requirements of strict scrutiny, but rather that, given the existence of the Top Ten Percent Law, UT's holistic system of individualized applicant review can never be constitutional. Pet. for Cert. 7-9.

In effect, petitioner suggests that virtually any attempt to pair a race-neutral admissions program with one that considers race and ethnicity as one of many factors designed to achieve the educational benefits of diversity renders the resulting hybrid program constitutionally infirm. This Court's precedents certainly require state institutions of higher education first to investigate "workable race-neutral alternatives that will achieve the diversity the university seeks" before resorting to any program that relies upon race. *Grutter*, 539 U.S. at 339. But they do not support the novel position

advanced by petitioner. There is no foundation in this Court's precedents for petitioner's suggestion that adoption of a race-neutral admissions plan that has achieved some success in creating diversity in the student body necessarily precludes the subsequent consideration of race and ethnicity in higher education permitted by this Court's precedents, especially where, as here, government officials have made a "good-faith" determination grounded in evidence that the compelling educational benefits offered by a broadly diverse student body have not been achieved using solely the race-neutral system. Pet. App. 29a. The experimentation and open "'dialogue regarding th[e] contested and complex policy question' of racial preferences" that Petitioner professes to promote in arguing otherwise would be undone by the outcome urged in this case. Pet. Br. 3-4. States operating in good faith reliance of and strict adherence to this Court's pronouncements should not be so "hobble[d]" in their efforts to fulfill their serious obligations. Pet. App. 53a.

A. This Court's Precedents Do Not Preclude UT's Simultaneous Use of Race-Neutral and Race-Conscious Strategies.

The exhortation that states explore viable race-neutral alternatives to utilize race as a consideration in a program's operation has, rightfully, become a regular coda in this Court's race cases. *See, e.g.*, *Johnson v. California*, 543 U.S. 499, 522-23 (2005) (holding policy unconstitutional "'[w]hen there has

been no serious, good faith consideration of race-neutral alternatives' . . . and 'when obvious, easy alternatives are available"); *Grutter*, 539 U.S. at 339 (holding that "[n]arrow tailoring . . . require[s] serious, good faith consideration of workable race-neutral alternatives"); *United States v. Paradise*, 480 U.S. 149, 171 (1987) (explaining that "[i]n determining whether race-conscious remedies are appropriate, we look to several factors, including . . . the efficacy of alternative remedies"); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n. 6 (1986) (holding that narrow tailoring "require[s] consideration" of "lawful alternative[s] and less restrictive means"). It reflects an understanding of the "sorry history of both private and public [racial] discrimination in this country," *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499 (1989), and the threat that such discrimination poses to our democracy. This Court, however, has made it clear that the Constitution does not require the adoption of race-neutral alternatives unlikely to achieve the compelling educational interests served by institutions of higher education. *Grutter*, 539 U.S. at 339.

In Texas, we understand all too well the importance of the imperative to minimize unnecessary, and potentially discriminatory uses of race. The invidious policies of racial segregation invalidated in *Sweatt*, 339 U.S. 629, still cast a shadow here. In 2003, when *Grutter* held that achieving the educational benefits of a broadly diverse student body constitutes a compelling governmental interest under the Fourteenth Amendment's Equal Protection Clause, 539 U.S. at 328, Texas legislators and education officials, as

previously noted, did not move immediately to repeal the Top Ten Percent Law. Instead, a careful assessment of higher education priorities ensued in which institutions such as UT assessed how well, given their particular circumstances, they were serving the compelling interests recognized in *Grutter*. Pet. App. 167a. After nearly seven years of experience with the race-neutral Top Ten Percent Plan and nearly a year of study and evaluation of its educational programs, UT officials made the sound educational judgment in 2004 that, while that plan provided an adequate foundation for admissions efforts at their institution, a holistic, individualized system of review that included limited consideration of race and ethnicity, among the many other factors included therein, was necessary to ensure that all students at UT received the compelling educational benefits of diversity. Pet. App. 167a-70a.

In order to accept petitioner's contention that UT acted improperly in adopting a holistic, individualized review program in addition to the race-neutral Top Ten Percent Plan adopted by the Legislature, one must essentially conceive of this Court's cases as creating two distinct, never-intersecting tracks for government decision making when it comes to addressing realities of race in their jurisdictions. On this theory, a state must commit itself in the first instance to a particular course of action and never supplement or depart from it, even when the limits of its effectiveness become apparent or when modification would be in the public interest. In effect, a state that has considered and found helpful, but not sufficient, certain race-neutral alternatives must never utilize even those race-conscious strategies whose use would comport with

strict scrutiny and better achieve the compelling interests sought. Conversely, on petitioner's view, a state that has determined, in the absence of workable race-neutral alternatives for its jurisdiction, to consider race in the first instance must do so as much as possible or risk running afoul of the Fourteenth Amendment.

Petitioner's proposed approach would hamstring states in carrying out their essential functions, *Lopez*, 514 U.S. at 580 (Kennedy, J. concurring), chill experimentation, and plainly discourage the consideration of the very race-neutral alternatives that the Court has required as a precursor to race-conscious methods. *See Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring in part and concurring in the judgment) (discussing alternatives that could be utilized by school districts). It risks undermining the important goal of minimizing uses of race that the Court's precedents reflect.

Even more, petitioner's argument rests on a complete misreading of the Court's precedents. No case requires states to make the sort of Solomonic choice urged. If anything, this Court's precedents recognize that, while states must give serious consideration to the adoption of race-neutral alternatives, *Grutter*, 539 U.S. at 339, resort to race-conscious policies may sometimes be appropriate. *See id.* at 327 ("When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied."). Indeed, sound policy should reward rather than seek to limit a state that employs race-neutral alternatives and then decides,

based upon that experience, that more is required to achieve its goals of creating a diverse learning environment to produce a vibrant future community of Texas leaders.

Fisher – Petitioner's arguments notwithstanding – reaffirmed and did not alter *Grutter* or any of this Court's other relevant precedents. Pet. App. at 16a. They were and remain crystal clear. Strict scrutiny applies to the determination of whether UT's educational judgment to overlay the otherwise race-neutral Top Ten Percent Plan with a program of holistic, individualized review that considers race and ethnicity as one of many factors comports with constitutional requirements, not the strange Hobson's choice proposed by petitioner. *See* Pet. App. 106a-12a; *see also Grutter*, 539 U.S. at 326 ("We apply strict scrutiny to all racial classifications to 'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool") (internal citation omitted); *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) ("It is by now well established that all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized") (internal citation omitted); *Adarand Constructors*, 515 U.S. at 230 (holding that "the application of strict scrutiny . . . determines whether a compelling governmental interest justifies the infliction of that injury"). This Court's decisions, not petitioner's proffered standard of review, directs how matters unique to the higher education context should be evaluated.

B. Petitioner Misapprehends the Top Ten Percent Law's Objectives and the Unique Educational Context in which UT's Admissions Plan Operates.

Counterintuitively, petitioner charges UT with using race both too little and too much. Petr's Br. 7-11. In doing so, petitioner badly misapprehends the objectives of the Top Ten Percent Law and the unique challenges confronting higher education in the State of Texas. The reality of the context in which legislators and higher education officials operate has direct relevance here. *See Grutter*, 539 U.S. at 327.

In effect, petitioner urges this Court to consider the impact of the Top Ten Percent Law in determining whether UT had a compelling need to apply its holistic, individualized review program as well, but then to discount that impact when assessing UT's compliance with even traditional narrow tailoring rules. "This turns narrow tailoring upside down." Pet. App. 20a, 44a. Petitioner cannot have it both ways. The modest use of race about which petitioner complains in the operation of UT's holistic, individualized review system is a direct function of the Ten Percent Law's proper, and "self-limiting" operation, not proof the program fails strict scrutiny. *Id.* at 42a. UT does not utilize race more because the Texas legislature, in enacting and then retaining the Top Ten Percent Law post-*Grutter*, sought first to explore and adopt, where possible, race-neutral alternatives. Neither the Texas Legislature nor UT should be penalized for that experimentation.

If anything, the UT admissions program's minimal use of race "is it strength, not its weakness." *Id.* at 45a. The Texas legislators and educators who share responsibility for UT's current admissions program deserve praise for identifying a way of minimizing the need to consider race in its admissions decisions, while maximizing the compelling educational benefits of diversity through a holistic, individualized review program, as strict scrutiny requires. *See* Pet. App. at 104a-09a; *Grutter*, 539 U.S. at 340-43. The way to assess that program's impact is not, as petitioner intimates, merely to count the heads of the minority students whose admission it facilitates -a proposal that, ironically, smacks of the racial balancing of which petitioner accuses UT. Instead, *Fisher* and *Grutter* require an investigation into how well and carefully UT's admissions program works to advance the compelling interest in achieving the educational benefits of diversity. Pet. App. at 107-09; *Grutter*, 539 U.S. at 334-41; *see also Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978); *Wygant*, 476 U.S. at 280.[7]

Texas officials, importantly, do not operate in the vacuum that petitioner seems to imagine. Legislators must carry out their functions and develop innovative strategies to balance often

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[7] Significantly, not even petitioner disputes the tremendous value of the education UT provides or that it, in enabling students to meet and engage with colleagues from a wide range of backgrounds inside the classroom and out, prepares "students for work and citizenship." *Grutter*, 539 U.S. at 331 (citing *Plyler*, 457 U.S. at 221). While the consideration of race under UT's individualized system of review is modest, the impact that it has on students' educational benefits is profound.

competing priorities based on facts as they exist on the ground at any given time. Indeed, the legislative sponsors of the Top Ten Percent Law were clearly conscious of the "changing needs of the state's changing population" in drafting that statute. *Statewide Higher Educational Admissions Policy*, HB588, House Research Organization Bill Analysis (Apr. 15, 1997) at 3. Likewise, UT "prepares students for work[,] . . . citizenship," and leadership in the state's public and private institutions in a complex, constantly shifting environment that, in the fifteen years since the Top Ten Percent Plan's adoption, has only become more demographically varied and will become even more so in the future. Susan Combs, Texas Comptroller of Public Accounts, *Window on State Government, Demographic Change in Education*.[8]

Statistics show that Texas' racial and ethnic composition is changing dramatically. For example, "in 1980, the Anglo population accounted for 65.7 percent of the state's total population, but by 2006 its share had declined to 48.3 percent. The Hispanic population, by contrast, accounted for 21 percent of the state's population in 1980 and 35.7 percent in 2006. The black population share declined slightly over the same period, from 11.9 percent in 1980 to 11.4 percent in 2006. The share attributable to the "Other" category, including persons of Asian and Native American descent, rose from 1.4 percent in 1980 to 4.6 percent in 2006." *Id.* These demographics have significant implications for "all

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[8] Available at http://comptroller.texas.gov/specialrpt/workforce/2008/PDF/04_Demographic_Change.pdf (last visited on October 30, 2015).

Texas elementary, secondary and postsecondary educational institutions" that are facing a "more racially and ethnically diverse student body," *id.* and bear directly on the "workability" of any plan that UT might consider. Pet. App. at 34a. This, in short, is the complex, polyglot world that UT is preparing its student to lead.

Petitioner's suggestion that one should look to enrollment levels from the period *prior* to the adoption of the Top Ten Percent Plan to determine the constitutionality of admissions efforts today is baseless. The Constitution simply does not require government officials to ignore the demographic realities and dynamic diversity of the jurisdictions in which they carry out their responsibilities. *See Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring in part and concurring in the judgment) (encouraging consideration of race-neutral strategies for addressing the need for diversity that take account of the realities of race on the ground without utilizing racial classifications). Petitioner's contention that mere awareness of demographic conditions constitutes racial balancing simply makes no sense in 21st Century Texas, where people from all over the country and the world come to make their future. The University of Texas is of vital importance to the State and has an obligation to "provide 'superior and comprehensive educational opportunities' and to 'contribute to the advancement of society.'" *Amici* respectfully submit that, to ensure that visibly open pathways to leadership and the world-class education are open for all Texans, there must be at least some acknowledgment of the need for diversity in the learning environment and the potential barriers to creating access to that

environment in this State. The University of Texas has an obligation to provide its citizens with unique educational opportunity and to advance "society through research, creative activity, scholarly inquiry and the development of new knowledge." (*Available at* https://www.utexas.edu/about/mission-and-values.)

Under *Grutter* and other precedents, the relevant inquiry in determining whether UT has used race too much is not whether officials appreciate the demographics and educational realities of the Texas communities from which UT primarily draws its student body.[9] Rather, it is whether the use of race as part of the admissions criteria is so significant as to amount to racial quotas or a guarantee of "a specified percentage of the student body . . . to be members of selected ethnic groups." *See Grutter*, 539 U.S. at 324 (quoting *Bakke*). As Chief Justice Roberts recognized in his plurality opinion in *Parents Involved*, ensuring that an institution engages in "individualized consideration [of applicants] in the context of a race-conscious admissions program is what is "paramount" in the higher education context. *Parents Involved*, 551 U.S. at 723. UT has fully complied with this mandate. The Court of Appeals' judgment that UT's admissions program satisfies

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[9] Indeed, if anything, it is Petitioner who strays too close to the line in this case, "point[ing] to the numbers and nothing more in arguing that . . . a 'critical mass' of minority students had been achieved by the time Fisher applied for admission – a head count by skin color or surname that is not the diversity envisioned by *Bakke* and a measure it rejected." Pet. App. at 45a.

Fisher and the requirements of strict scrutiny. Pet. App. 3a, 54a, should thus not be disturbed.

III. THE REALITIES OF 21st CENTURY EDUCATION AND RACE REQUIRE THAT STATES BE PERMITTED TO PURSUE INNOVATIVE STRATEGIES TO MEET COMPELLING NEEDS WITHIN THE LIMITS OF STRICT SCRUTINY.

Texans can be proud that a great deal has changed in our State and Nation since *Sweatt v. Painter*. But, as both *Fisher* and *Grutter* attest, the realities of race and higher education in the 21st Century still make the adoption of innovative strategies necessary to ensure that our universities, as well as other important public and private institutions, reflect the broad diversity that is America. *See Grutter*, 539 U.S. at 330-332. States like Texas need the room to experiment with innovative programs addressing the realities of higher education and the challenges to creating a diverse learning environment in order to develop leaders of a multi-cultural future. *See Lopez*, 514 U.S. at 583 (Kennedy, J., concurring); *see also Statewide Higher Educational Admissions Policy*, HB588, House Research Organization Bill Analysis (Apr. 15, 1997) at 4 (acknowledging, *inter alia*, that the Top Ten Percent Plan achieves a measure of diversity because of persistent racial segregation in many areas). That those realities include "de facto segregation of schools in Texas" and the significant "outcome gaps of segregated urban schools," in particular, does not render the state's initiatives

constitutionally infirm. Pet. App. 32a and 35a. Texas seeks not to "remedy" such conditions through its higher education policy, but rather to be responsive to the ways in which they affect the "workability" of the alternatives at their disposal. Pet. App. at 34a. This Court's cases do not require Texas to ignore such real world challenges. *See Parents Involved*, 551 U.S. at 787-88 (Kennedy, J., concurring in part and concurring in the judgment).

Petitioner asks this Court to invalidate UT's admissions policy, the product of years of experimentation and collaboration by legislators and educators. In its stead, she proposes locking in place the Top Ten Percent Plan as the sole admissions criterion, which has significant merits but does not fully achieve the legitimate goals of Texas higher education. The doctrinal approach she advances would require states and localities across the country to "cope with the difficult problems they face . . . deprived of one means they may find necessary." *Parents Involved*, 551 U.S. at 866 (Breyer, J., dissenting). This is the antithesis of the state experimentation and open "dialogue regarding the wisdom and practicality of race-conscious admissions policies in higher education" that this Court celebrated in upholding Michigan's choice in *Schuette*. *Schuette*, 134 S.Ct. 1629, 1630-31. "Our federalism" insists upon a less constrained and more robust role for states and localities in addressing issues as critical as education and race. *Younger*, 401 U.S. at 44. Indeed, it is premised on the "belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Id.* Texas should not be forced to respond to the unique

conditions in its communities and institutions of higher education as another state might.

History tells us that, especially where race is concerned, silver bullets and easy answers will be hard to find. *See Lopez*, 514 U.S. at 581-82 (Kennedy, J., concurring) (noting that states and localities "perform their role as laboratories for experimentation . . . [in situations] where the best solution is far from clear"). Instead of the rigid, two-track approach for which petitioner advocates, states must have the latitude to contend with the facts as they exist in the jurisdictions in which they carry out their important functions, not an idealized set of facts. *Id.* Just as Texas legislators and educators came to the judgment that the State's demographic realities limit their ability to achieve the benefits of diversity through race-neutral means alone, officials in California, Michigan, or Montana must have the room to devise solutions that will work with their citizenry and higher education systems. *See Schuette*, 134 S.Ct. at 1630-31.

In urging that the Court uphold the University's admissions process, *amici*, importantly, do not suggest that "good faith [sh]ould forgive an impermissible consideration of race." Pet. App. 113a. We do not ask this Court to write a blank check for states seeking to experiment with a range of solutions in addressing the higher education challenges of the 21st Century. Instead, *amici* argue that the requirements of strict scrutiny articulated in *Grutter* and reaffirmed in *Fisher* place meaningful constraints on government entities and that those constraints have been met here. They ensure that we will never return to a world in which the access of a

candidate like Heman Sweatt to a state's flagship institution of higher education depends on race alone. UT's admissions program reflects not racial balancing, but the careful balancing of priorities and resources committed to producing the future leaders of Texas and elsewhere, and should be upheld as constitutional.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals upholding the constitutionality of UT's undergraduate admissions policy should be affirmed.

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